

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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CARL LUCIO VENDITTELLI,

Plaintiff/Cross-Appellant-Appellee,

v

WANDA JUNE VENDITTELLI,

Defendant/Cross-Appellee-  
Appellant.

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UNPUBLISHED  
November 7, 2006

No. 261320  
Wayne Circuit Court  
LC No. 04-412147-DO

Before: Borrello, P.J., and Jansen and Cooper, JJ.

PER CURIAM.

Defendant appeals as of right a February 15, 2005, judgment of divorce, and plaintiff cross-appeals. We affirm.

**I. FACTS AND PROCEDURAL HISTORY**

Plaintiff and defendant were married on February 16, 1964. They had four children, who are now adults. During the marriage, defendant was a stay at home mother who did not work outside the home and plaintiff worked as a bricklayer and a field supervisor for a construction company. In July 2000, after 36 years of marriage, defendant filed an action for separate maintenance. At that time, defendant was 56 years old and unemployed, and plaintiff was 71 years old and was retired. Plaintiff filed an answer and a counter-complaint for divorce,<sup>1</sup> but the matter proceeded as a separate maintenance action. In February 2001, the parties' attorneys signed a consent order agreeing to binding arbitration "on all issues including, but not limited to, alimony (both modifiable and/or non-modifiable), including arrearages, property and attorney fees."

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<sup>1</sup> Plaintiff filed more than one complaint for divorce and asked the court to grant him a divorce on numerous occasions. However, the complaints and requests for divorce did not proceed for various reasons. Plaintiff filed his final complaint for divorce, which was ultimately granted, on April 22, 2004.

In August 2001, arbitrator Arnold P. Garber issued a binding arbitration award, and in November 2001, he issued a revised arbitration award. In December 2001, the trial court entered a judgment for separate maintenance, which incorporated Garber's revised arbitration award. The judgment for separate maintenance ordered plaintiff to pay defendant spousal support in the amount of \$300 per month until the death of either party or the remarriage of defendant. It also ordered plaintiff to pay for defendant's health care insurance until the death of either party or the remarriage of defendant. The judgment for separate maintenance also divided up the parties' property and other assets. The parties each received an equal interest in the following assets: the parties were awarded the marital home as tenants in common (plaintiff was ordered to pay defendant \$130,000 for her interest in the home and upon payment, defendant was to execute a quit claim deed conveying all of her interest in the home to plaintiff), the parties were ordered to list with a realtor property that they owned on Canton Center Road and equally divide the proceeds from the sale of the property, the parties were to equally divide the Jackson National Life Annuity, the funds in the Merrill Lynch account, 400 shares of SEPR Energy stock, 200 shares of National Australian Bank stock, and \$67,500 cash in a safety deposit box at National City Bank. Plaintiff alone was awarded: his pension benefits, real estate in San Vittore, Italy, his one-fifth interest in a farmhouse in San Vittore, Italy, \$700 cash located in a bank in San Vittore, Italy, his Templeton Individual Retirement Account, his Scottsdale account, his OLDE account, his 1997 Cadillac, and \$5,000 in American Express Travellers Cheques. Defendant alone was awarded: the First of America Certificate of Deposit, her Putnam Investment account, another Certificate of Deposit, and her leased Mercury Sable.

On April 22, 2004, plaintiff filed a complaint for divorce. In lieu of testimony, the parties submitted written briefs. The trial court entered a judgment of divorce on February 15, 2005. The judgment of divorce awarded defendant spousal support in the amount of \$600 per month until the death of either party or the remarriage of defendant. It also ordered plaintiff to pay for defendant's health care insurance until the death of either party or the remarriage of defendant. Regarding the division of property, the divorce judgment specifically adopted and incorporated "[t]he property provisions of the *Judgment of Separate Maintenance* entered on December 14, 2001 . . . ."

## II. ANALYSIS

Defendant argues that the trial court erred in incorporating the arbitrator's binding decision regarding the division of property that was adopted in the judgment of separate maintenance into the judgment of divorce. According to defendant, the trial court should have resolved the property settlement anew in the judgment of divorce.

In its opinion regarding postjudgment issues and divorce, dated December 16, 2004, the trial court concluded that it would not decide the property issues anew in the divorce action, stating:

Under Michigan law, a separate maintenance action is not a bar to a subsequent absolute divorce action. Engemann v Engemann, 53 Mich App 588, 594; 219 NW2d 777, 780 (1974). As with all divorce actions, a divorce action that follows a separate maintenance action must address each party's property rights and spousal support. However, when the property issues have been resolved in the separate maintenance action, there are no property issues to

address in the divorce action. See, e.g., Bedsworth v Bedsworth, Unpublished Opinion of the Michigan Court of Appeals (Case No. 228200; issued September 13, 2002) (the division of marital property in a precedent judgment of separate maintenance must be set aside before the subsequent divorce judgment can modify the property division). Since the Judgment of Separate Maintenance entered in Case No. 00-022900 divided the parties' property and it has not been set aside, the Judgment of Divorce in Case No. 04-412147 will defer to the property settlement provisions in the Judgment of Separate Maintenance. . . .

This Court recently affirmed a trial court's determination that a separation agreement, which included a property settlement, was valid and enforceable under general contract principles and that when the husband and wife subsequently divorced, the property was to be distributed as the parties agreed in the separation agreement. In *Lentz v Lentz*, 271 Mich App 465; \_\_\_ NW2d \_\_\_ (2006), a husband and wife decided to separate and negotiated a separation agreement, which included a property settlement. Subsequently, the husband filed a complaint for separate maintenance and asked the trial court to divide the property pursuant to the parties' separation agreement. The wife argued that the separation agreement should be set aside because the husband coerced her into signing the agreement, she could not afford to hire a lawyer to review it, and the husband failed to give her a valuation of his businesses. The trial court granted the parties a divorce and ruled that the separation agreement was valid, equitable, and enforceable and that the wife failed to show that she entered into the agreement because of fraud, coercion, or duress. The judgment of divorce therefore provided that the property would be distributed as the parties agreed in the separation agreement. This Court affirmed, holding that the wife failed to establish fraud, coercion, or duress and concluding that the parties entered into a valid and enforceable contract that was required to be affirmed under general contract principles:

Public policy favors upholding a property agreement negotiated by the parties when divorce or separate maintenance is clearly imminent. Such agreements undoubtedly promote judicial efficiency and best effectuate the intent and needs of the parties. Further, we will not rewrite or abrogate an unambiguous agreement negotiated and signed by consenting adults by imposing a "reasonable" or "equitable" inquiry on the enforceability of such agreements. An application of general contract principles to this agreement mandates only one conclusion: the parties freely entered an agreement to divide their property as they saw fit and we will not redraft the agreement or rule in a manner that allows either party to avoid his or her contractual obligations. [*Lentz, supra* at 477-478.]

In the instant case, unlike the parties in *Lentz*, the parties did not enter into a separation agreement. Rather, they entered into a "consent order for binding arbitration," in which the parties specifically agreed "that the arbitrator shall have authority to bind the parties on all issues including, but not limited to, alimony (both modifiable and/or non-modifiable), including

arrearrages, property and attorney fees.”<sup>2</sup> Like the separation agreement in *Lentz*, the arbitration agreement in this case is a contract. *Beattie v Autostyle Plastics, Inc*, 217 Mich App 572, 577; 552 NW2d 181 (1996) (“An arbitration agreement is a contract by which the parties forgo their rights to proceed in civil court in lieu of submitting their dispute to a panel of arbitrators.”) The reasoning behind this Court’s holding in *Lentz* applies equally to an agreement to arbitrate in a divorce case because the holding in *Lentz* was based on contract principles and an agreement to arbitrate, like a separation agreement, is a contract. Contracts between competent adults are enforced according to the unambiguous terms to which the parties themselves agreed. *Rory v Continental Ins Co*, 473 Mich 457, 468; 703 NW2d 23 (2005). Under the consent order for binding arbitration, both plaintiff and defendant clearly and unambiguously agreed to binding arbitration of the distribution of their property. The parties are therefore bound by the arbitrator’s distribution of their property. “[U]nambiguous contracts are not open to judicial construction and must be *enforced as written*. Courts enforce contracts according to their unambiguous terms because doing so *respects the freedom of individuals freely to arrange their affairs via contract*.” *Lentz*, *supra* at 472, quoting *Rory*, *supra* at 468. Furthermore, “*competent persons shall have the utmost liberty of contracting and . . . their agreements voluntarily and fairly made shall be held valid and enforced in the courts*.” *Lentz*, *supra* at 472-473, quoting *Rory*, *supra* at 468 (emphasis in *Lentz*; quotations omitted). Therefore, under the reasoning of *Lentz*, the parties’ agreement to arbitrate must be enforced as written, which renders the property division in the arbitration award binding.

In addition, the public policy reasons that favor upholding a property agreement negotiated by parties seeking divorce or separate maintenance apply equally when the parties enter into an agreement to allow an arbitrator to resolve issues such as distribution of property. In both cases, the parties are encouraged to settle their differences and the necessity of a contested hearing is avoided. *Lentz*, *supra* at 476; *Keyser v Keyser*, 182 Mich App 268, 271-272; 451 NW2d 587 (1990). Judicial efficiency is promoted and the needs and intent of the parties are best effectuated by upholding an agreement that is freely reached by the parties, whether the agreement consists of the parties’ own negotiated agreement or the parties’ agreement to have an arbitrator decide such issues. Furthermore, Michigan’s public policy strongly favors arbitration. *Jozwiak v Northern Michigan Hosps, Inc*, 207 Mich App 161, 165; 524 NW2d 250 (1994).

By agreeing to binding arbitration, the parties essentially consented in advance to the arbitrator’s division of their property. “[C]ourts are bound by property settlements reached through negotiations and agreement by parties to a divorce action . . . .” *Keyser*, *supra* at 269-270. Absent evidence of fraud, coercion, or duress, the court cannot set aside or alter provisions of a divorce judgment reached by negotiation and agreement by the parties. See *Lentz*, *supra* at 472. In this case, there is no evidence of fraud, coercion, or duress, and defendant does not argue that there was fraud, coercion, or duress in the context of signing the consent order to arbitrate and does not seek to set aside the agreement to arbitrate on any of these grounds. Therefore, for the reasons articulated, we conclude that because the parties clearly and unambiguously agreed

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<sup>2</sup> MCL 600.5071 provides that parties to an action for separate maintenance may stipulate to binding arbitration of, among other issues, the distribution of property.

to binding arbitration of the distribution of their marital property in the consent order for binding arbitration, the trial court did not err in incorporating the arbitrator's decision regarding the distribution of the parties' property, which was adopted in the judgment of separate maintenance, into the judgment of divorce.<sup>3</sup>

In support of his argument that the trial court did not err in incorporating the property division in the arbitration award into the judgment of divorce, plaintiff argues that the division of property in this matter is *res judicata* because the arbitrator already decided the issue of the division of property and the elements of *res judicata* have been satisfied. This Court has previously rejected a similar *res judicata* argument. See *Engemann v Engemann*, 53 Mich App 588; 219 NW2d 777 (1974). As we stated in *Kresnak v Kresnak*, 190 Mich App 643; 476 NW2d 650 (1991): "In the context of *res judicata*, this Court has recognized the 'substantial difference between a divorce from bed and board [separate maintenance] and a divorce from the bonds of matrimony.'" *Kresnak, supra* at 649 n 2, quoting *Engemann, supra* at 594. We therefore reject defendant's *res judicata* argument.

Both plaintiff and defendant argue that the trial court abused its discretion in awarding spousal support. According to plaintiff, the trial court erred in evaluating the factors to consider when making a decision regarding the award of spousal support and in modifying the amount of spousal support awarded to defendant without new facts or changed circumstances to warrant such a modification. According to defendant, the spousal support award was inequitable and failed to place the parties in equivalent economic circumstances.

In the judgment of separate maintenance, plaintiff was ordered to pay defendant spousal support of \$300 per month until the death of either party or the remarriage of defendant. In the judgment of divorce, the trial court increased the amount that plaintiff was ordered to pay defendant to \$600 per month until the death of either party or until defendant remarried. Whether to award spousal support is in the trial court's discretion, and this Court reviews the trial court's award for an abuse of discretion. *Gates v Gates*, 256 Mich App 420, 432; 664 NW2d 231 (2003); *Pelton v Pelton*, 167 Mich App 22, 27; 421 NW2d 560 (1988). The purpose of spousal support is to balance the incomes and needs of the parties in a way which will not impoverish either party. *Moore v Moore*, 242 Mich App 652, 654; 619 NW2d 723 (2000). An award of spousal support is to be based on what is just and reasonable under the circumstances. *Maake v Maake*, 200 Mich App 184, 187; 503 NW2d 664 (1993). A trial court's factual findings regarding the award or modification of spousal support are reviewed for clear error. *Moore, supra* at 654. The findings are presumptively correct, and the burden is on the appellant to show

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<sup>3</sup> As a practical matter, we note that because the judgment of separate maintenance distributed the parties' property, there is no marital estate to distribute. As the trial court aptly observed: "when the property issues have been resolved in the separate maintenance action, there are no property issues to address in the divorce action." Moreover, the judgment of separate maintenance was issued on December 14, 2001, and the judgment of divorce was issued more than three years later, on February 15, 2005. The passage of this amount of time would complicate a redistribution of property because it is entirely possible that the parties may have disposed of certain properties or acquired additional properties during this period.

clear error. *Gates, supra* at 432. “A finding is clearly erroneous if the appellate court is left with a definite and firm conviction that a mistake has been made.” *Moore, supra* at 654-655. If the trial court’s factual findings are not clearly erroneous, an appellate court must determine whether the dispositional ruling was fair and equitable in light of the facts. *Id.* at 655. The trial court’s decision regarding spousal support must be affirmed unless this Court is firmly convinced that it was inequitable. *Gates, supra* at 433.

The following factors are to be considered in making a determination to award spousal support: (1) the past relations and conduct of the parties; (2) the length of the marriage; (3) the abilities of the parties to work; (4) the source and amount of property awarded to the parties; (5) the parties’ ages; (6) the ability of the parties to pay alimony; (7) the present situation of the parties; (8) the needs of the parties; (9) the parties’ health; (10) the prior standard of living of the parties and whether either is responsible for the support of others; (11) contributions of the parties to the joint estate; (12) a party’s fault in causing the divorce; and (13) general principles of equity. *Magee v Magee*, 218 Mich App 158, 162; 553 NW2d 363 (1996); *Thames v Thames*, 191 Mich App 299, 308; 477 NW2d 496 (1991). In its opinion regarding postjudgment issues and divorce, the trial court articulated these factors and then made findings with respect to each factor.

Defendant argues that the spousal support award was inequitable, in part, because plaintiff was awarded his two pensions in full in the property distribution and she did not receive any portion of either pension. It is true that plaintiff received his two pensions in the property distribution. Plaintiff asserts that defendant actually consented to plaintiff receiving both of his pensions in exchange for cash. However, this claim is not addressed in the judgment of separate maintenance or the judgment of divorce. While the amount of property awarded to the parties is a factor to consider in making a spousal support determination, defendant cannot complain about the distribution of the marital property when she agreed to binding arbitration of property distribution issues. As we have already stated, the disposition of the parties’ property in the arbitration award and adopted in the judgment of separate maintenance is binding. Therefore, defendant’s arguments that relate to the fact that plaintiff received both of his pensions in the property distribution are unpersuasive because defendant agreed to be bound by the arbitrator’s decision regarding the division of the parties’ property. We also observe that treatment of pension benefits may vary. Depending on the equities and the circumstances, pensions may be distributed either through the property division or the award of spousal support. *Magee, supra* at 164-165. In light of the fact that the trial court was bound by the awarding of both pensions to plaintiff, the trial court may have considered this fact in increasing the spousal award to defendant.

Plaintiff argues that the trial court erred in evaluating the source and amount of property awarded to the parties. According to plaintiff, the trial court failed to consider that defendant was awarded income-producing assets in determining defendant’s ability to generate future income for herself. However, as the trial court observed, plaintiff was also awarded income producing assets in the property division. The trial court did not consider either party’s income producing assets in calculating their annual incomes so as to make a determination of spousal support. Moreover, plaintiff does not cite to specific income generating assets and does not allege how much income any such asset allegedly generated. The trial court’s findings and conclusions regarding this factor are not clearly erroneous.

Defendant next argues that the spousal support award was inequitable and did not leave the parties in roughly equal positions. Defendant's assertion is inaccurate. In calculating spousal support, the trial court found that plaintiff's income was \$40,000 per year (\$3,333 per month) and that defendant's income was \$20,000 per year (\$1,667 per month). Defendant does not dispute plaintiff's income, but asserts that her income is \$18,000 annually (\$1,500 per month). The trial court awarded spousal support to plaintiff in the amount of \$600 per month and also ordered plaintiff to pay for defendant's health insurance until the death of either party or defendant's remarriage. The cost of defendant's health insurance is about \$220 per month. Reducing plaintiff's monthly income by the \$820 that he pays per month for spousal support and defendant's health insurance, plaintiff's monthly income is \$2,513. Adding \$820 to defendant's monthly income makes defendant's monthly income \$2,320. While these amounts are not exactly equal, they are roughly equal.

Defendant argues that the trial court erred in concluding that she could work continuously for four more years. She contends that because of her declining health, "it is highly unlikely that she can continue for long with her current level of work." Plaintiff also argues that the trial court erred in assessing this factor, arguing that the trial court improperly speculated regarding how many years defendant could continue to work. The trial court stated, "[p]resuming that she will likely retire at age 65, [defendant] is likely to work for only 4 more years." This is a finding of fact. A trial court's factual findings regarding the award or modification of alimony are reviewed for clear error. *Moore, supra* at 654. A finding is clearly erroneous if the appellate court is left with a definite and firm conviction that a mistake has been made. *Id.* at 654-655. We are not left with a definite and firm conviction that the trial court's finding regarding the length of time defendant would be able to work is a mistake or improperly speculative. Many people retire at age 65, and the trial court's presumption in this regard is not unduly speculative. The trial court recognized that defendant's health was declining and articulated some of her medical problems, which included allergies, asthma, chronic muscle fatigue, chest pains, diverticulosis, and irritable bowel syndrome. Although the trial court's factual conclusion regarding the length of time defendant could continue to work might have been hopeful or optimistic, it is not clearly erroneous.

Defendant next argues that plaintiff has the ability to pay spousal support and that the trial court therefore erred in evaluating this factor. According to defendant, plaintiff has received a financial windfall since the parties separated and divorced, which has allowed him to make extra payments on his mortgage, enjoy extensive international travel to countries such as Italy, Spain, Morocco, Mexico, and Cuba, make donations to charitable institutions, and give monies to the parties' grandchildren. For his part, plaintiff argues that the trial court failed to fully explore plaintiff's financial status and the fact that defendant elected to decline plaintiff's pension benefits in exchange for cash. The trial court found that plaintiff's income was nearly double defendant's income and that plaintiff had the ability to pay spousal support. This finding of fact is not clearly erroneous. Plaintiff's payment of \$600 per month to defendant in spousal support and approximately \$220 per month for defendant's health insurance roughly equalizes the parties' incomes. The main objective of spousal support is to balance the incomes and needs of the parties in a way that will not impoverish either. *Magee, supra* at 162. In this case, the trial court's award of spousal support roughly equalizes or balances the parties' annual incomes.

Defendant next argues that the spousal support award is deficient because it does not protect her after plaintiff dies. Security for future financial support is a concern for defendant because plaintiff is approximately fifteen years older than defendant. According to defendant, “[t]he trial court’s failure to provide for any security for continuation of support after [plaintiff’s] death will leave [defendant] in dire circumstances.” Defendant suggests that because she would be left with no support in the event of plaintiff’s death, “the support obligation in this case should be secured appropriately, such as through a life insurance policy payable to [defendant].” In *Kurz v Kurz*, 178 Mich App 284; 443 NW2d 782 (1989), this Court held that the trial court abused its discretion in requiring the plaintiff to maintain a life insurance policy naming the defendant as the sole beneficiary to secure her right to alimony, stating:

Under the terms of the divorce judgment, plaintiff’s obligation to pay alimony ceased upon the occasion of his death. Defendant was not awarded a lump sum alimony award which plaintiff was absolutely obligated to pay, even posthumously. At the moment the insurance proceeds became payable, defendant was no longer entitled to the very award which the insurance policy was meant to secure. Moreover, if there was an arrearage in alimony at the time of plaintiff’s death, defendant could collect merely by making a claim against the estate. Hence, the trial court’s order to maintain the insurance policy served no real purpose. We therefore vacate that particular requirement of the divorce judgment. [*Kurz*, *supra* at 297.]

Like the spousal support award in *Kurz*, the spousal support in the instant case was not awarded in a lump sum and ceased upon the death of plaintiff. We are not aware of, and defendant does not cite, any caselaw or statute that would require the trial court to order the procurement of a life insurance policy to secure future spousal support payments. Therefore, for the reasons this Court articulated in *Kurz*, it was not error for the trial court to find that defendant was not entitled to an insurance policy for security of spousal support.

Plaintiff argues that the trial court erred in assessing the present situation of the parties in that it speculated regarding the source of the financial resources that enabled him to engage in various activities. Regarding this factor, the trial court found that plaintiff had been able to pay off his mortgage since the judgment of separate maintenance was ordered and that he had taken a number of trips out of the country, invested money for his grandchildren, and made charitable donations. Plaintiff asserts that the trial court assumed that plaintiff paid for these activities solely with his monthly income. The trial court asserted that plaintiff’s “retirement income is greater than his expenses.” This is a finding of fact that is not clearly erroneous. The trial court recognized that the property that both parties received “included investments and other income-producing assets.” Based on the trial court’s recognition of this fact, we reject plaintiff’s contention that the trial court assumed that plaintiff paid for the aforementioned activities solely with his monthly income. There was no clear error in the trial court’s findings regarding this factor.

Defendant also argues that the spousal support award was inadequate because it was not enough to meet her basic needs, her standard of living had deteriorated since the divorce, and she was being forced to deplete her assets to survive. The trial court recognized these factors, and that is part of the reason why it increased her spousal support from \$300 per month to \$600 per month. The trial court’s decision regarding spousal support must be affirmed unless this Court is

firmly convinced that it was inequitable. *Gates, supra* at 433. In this case, based on the parties' annual incomes, the trial court's \$600 monthly spousal support award, coupled with the fact that plaintiff was also ordered to pay \$220 per month for defendant's health insurance, is equitable.<sup>4</sup>

Plaintiff argues that there was not a change in circumstances sufficient to warrant a modification in the amount of spousal support between the time the judgment of separate maintenance and the judgment of divorce. In addressing the issue of spousal support, the trial court appeared to treat it not as a modification of spousal support, but as an original spousal support determination. Therefore, the trial court did not approach the award of spousal support as a modification of spousal support and did not address whether there was a change in circumstances. We decline to address this issue because it was not addressed by the trial court. *Fast Air, Inc v Knight*, 235 Mich App 541, 549; 599 NW2d 489 (1999).

Defendant next argues that the trial court erred in failing to award her all of the monies in the Merrill Lynch account as a sanction for plaintiff's attempt to conceal or dispose of a small portion of the monies in the account. This argument is without merit.

In both the original arbitration award of August 3, 2001, and the revised arbitration award of November 5, 2001, the arbitrator awarded the Merrill Lynch account as follows: "Each party shall be awarded fifty percent of the Merrill Lynch account and each party shall be responsible for any tax liability on his/her share of this account." The arbitration awards listed the value of the account as \$440,000. Judicial review of a binding arbitrator's award is strictly limited by statute and court rule. *Krist v Krist*, 246 Mich App 59, 66; 631 NW2d 53 (2001). Under MCR 3.602(1), parties are bound by a binding arbitrator's decision, unless:

- (a) the award was procured by corruption, fraud, or other undue means;
- (b) there was evident partiality by an arbitrator appointed as a neutral, corruption of an arbitrator, or misconduct prejudicing a party's rights;
- (c) the arbitrator exceeded his or her powers; or
- (d) the arbitrator refused to postpone the hearing on a showing of sufficient cause, refused to hear evidence material to the controversy, or otherwise conducted the hearing to prejudice substantially a party's rights.

Defendant argues that a provision of the arbitrator's August 3, 2001 award, required the trial court to sanction plaintiff for violating the ex parte order prohibiting the transfer of property. The provision to which defendant refers provides: "In the event any substantial assets or liabilities are later discovered, the party failing to disclose or hiding such assets and/or liabilities

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<sup>4</sup> We were informed at oral argument that the trial court entered a postjudgment order directing defendant to apply for health insurance through her employer, effectively reducing the amount of plaintiff's payments to her. Nonetheless, this information does not change our resolution of the issues in this case.

shall be subject to costs, sanctions and attorney fees and the matter shall be reopened relative to the newly discovered assets or liabilities.” Essentially, defendant seeks a modification of the binding arbitration award based on this provision in that she contends that the trial court should have awarded her all of the funds in the Merrill Lynch account rather than merely half as a sanction for plaintiff’s violation of the ex parte order prohibiting the transfer of property.

In its opinion regarding postjudgment issues and divorce, the trial court awarded defendant half of the monies in the Merrill Lynch account, stating:

The Merrill Lynch Account withdrawals, totaling \$16,317.39, were made during 2000 and in January 2001. After the entry of July 26, 2000, Ex Parte Mutual Restraining Order Against Property Transfer, [plaintiff] withdrew a total of \$15,767.39 from the Merrill Lynch account. These withdrawals were neither made with [defendant’s] permission nor from an account that was routinely used to pay household expenses. However, \$2,000 that was withdrawn from the Merrill Lynch Account was placed into an IRA account for the benefit of the grandchildren, and this Court will presume that [defendant] would have approved that withdrawal. This leaves \$13,767.39 that [plaintiff] improperly withdrew from the Merrill Lynch Account. [Plaintiff] will be required to pay [defendant] half of this amount, which is \$6883.70.

Plaintiff moved for reconsideration, arguing, in part, that the court should not have required him to reimburse defendant \$6,883.70 from the Merrill Lynch account because he did not conceal the asset, but used the account to pay marital bills, and because the trial court had no authority to disturb the arbitrator’s original decision to award each party half of the funds in the Merrill Lynch account. In reversing its earlier ruling in the opinion regarding postjudgment issues and divorce regarding the monies in the Merrill Lynch account, the trial court stated:

After reviewing the facts and the pertinent law, the Court determines that it made a palpable error, the correction of which would lead to a different disposition. Even though the Court remains convinced that [plaintiff] improperly spent monies from the Merrill Lynch account, [plaintiff] is correct that this Court should not have considered alterations to Arbitrator Garber’s division of the Merrill Lynch account. . . . [A]lterations to Arbitrator Garber’s Award with regard to the Merrill Lynch account would require that the Court disturb the Arbitration Award, which it cannot do.

Defendant’s argument that the trial court was required to sanction plaintiff is without merit. The inclusion of the provision in the arbitrator’s award does not mandate action on the part of the trial court and did not obligate the trial court to impose sanctions. It simply provided a mechanism for the trial court to subsequently address and modify an arbitration decision that would otherwise be unreviewable. In this case, it is clear from the trial court’s statements regarding the Merrill Lynch account in its opinion regarding postjudgment issues and divorce that the trial court was aware that plaintiff violated the ex parte order by withdrawing funds from the account. The trial court’s ultimate decision that awarding defendant one half of the funds in the account was not in error, particularly given the fact that both parties claimed that the other concealed assets. We note that in its opinion regarding postjudgment issues and divorce, the trial court also rejected plaintiff’s claims that defendant concealed certain assets on the ground that

the arbitrator had addressed plaintiff's claims and the trial court was without authority to disturb the arbitrator's decision in this regard. Because the trial court was bound by the arbitrator's division of the funds in the Merrill Lynch account and because the trial court was not obligated by the provision in the arbitration award to impose sanctions, the trial court did not err in failing to sanction plaintiff by awarding defendant the entire amount in the Merrill Lynch account. The parties agreed to binding arbitration, and the arbitrator's decision regarding division of the parties' assets, including the division of the proceeds of the Merrill Lynch account, is binding.

Defendant next argues that the trial court should have ordered plaintiff to pay additional attorney fees based on her financial need and that she is entitled to recover costs and fees associated with this appeal.

Attorney fees are not recoverable as of right in divorce actions. *Reed v Reed*, 265 Mich App 131, 164; 693 NW2d 825 (2005). However, a party may be ordered to pay another party's attorney fees and expenses if the party is unable to bear the expense of the action. MCR 3.206(C)(2)(a). In addition, a party may be ordered to pay another party's attorney fees and expenses "where the party requesting payment of the fees has been forced to incur them as a result of the other party's unreasonable conduct in the course of the litigation." *Stackhouse v Stackhouse*, 193 Mich App 437, 445; 484 NW2d 723 (1992). A trial court's decision to award attorney fees is reviewed for an abuse of discretion. *Reed, supra* at 164. Any findings of fact on which the trial court bases an award of attorney fees are reviewed for clear error, but questions of law are reviewed de novo. *Id.*

We hold that the trial court did not abuse its discretion in awarding attorney fees to defendant in the amount of \$6,947.50 based on plaintiff's unreasonable conduct. In awarding attorney fees to defendant, the trial court stated:

The Court finds that [plaintiff's] behavior has been extremely obstreperous during the past two years. He has filed in pro per motions at times when he was represented by counsel, and these motions have required a response by [defendant's] counsel. Even when the Court has ruled on issues, [plaintiff] has not acted in accord with those rulings. Instead, he has continued to raise those issues in subsequent in pro per motions in utter disregard of the Court's rulings. [Plaintiff's] behavior has greatly increased the cost of the litigation. The brunt of this cost is being borne by [defendant], who has been represented by the same attorney from the start of this case and who has paid attorney fees throughout this case. [Defendant] asserts that she has paid over \$10,000 in attorney fees to defend against [plaintiff's] post-judgment motions.

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In the present case, [plaintiff's] unreasonable conduct caused [defendant] to incur legal fees. Accordingly, [plaintiff] will be ordered to pay the attorney fees that [defendant] unnecessarily incurred due to his improper actions. [Defendant] shall present her attorney bills to the Court for in camera inspection, with a list of which fees were unnecessarily incurred.

Defendant argues that the trial court abused its discretion in failing to award additional attorney fees based on her inability to bear the expense of the action. Based on the lower court record that was provided to this Court, it does not appear that defendant requested attorney fees on the basis of need. Therefore, the issue is not preserved for appeal because it was not raised before and addressed by the trial court. *Fast Air, Inc, supra* at 549.

Defendant also argues that she is entitled to an award for her appellate fees and costs based on her inability to bear the cost of the expense of an appeal. Appellate attorney fees and costs are available under MCR 3.206(C)(1), which provides that “[a] party may, at any time, request that the court order the other party to pay all or part of the attorney fees and expenses related to the action . . . .” See also *Gates, supra* at 439. MCR 3.206(C)(2) provides that “[a] party who requests attorney fees and expenses must allege facts sufficient to show that (a) the party is unable to bear the expense of the action, and that the other party is able to pay . . . .” Defendant conclusively states that she is entitled to appellate attorney fees without alleging facts showing that she is unable to pay or that plaintiff is able to pay. Although the trial court stated in the opinion regarding postjudgment issues and divorce that defendant “is depleting her savings in order to pay her expenses even though she is living a modest lifestyle,” defendant did not allege sufficient facts under MCR 3.206(C)(2)(a) to warrant an award of appellate attorney fees and costs.

Plaintiff argues that the chief judge erred in reassigning the case to herself. At the hearing on plaintiff’s motion to disqualify the judge that was assigned to the case, the trial court indicated that “[plaintiff] did request that this matter be reassigned to myself and that I preside over this case.” Plaintiff sought disqualification of the former judge in the case on the grounds that the former judge discriminated against him and was biased against him. At the motion hearing, plaintiff implored the chief judge: “I pray this court to end this divorce today. I will not go in front of another judge. . . . Whatever this court wants to do to me, can do it because that is the end of it.” This issue is waived on appeal because under the doctrine of invited error, a party waives the right to seek appellate review when the party’s own conduct caused the error. *People v McPherson*, 263 Mich App 124, 139; 687 NW2d 370 (2004). Because plaintiff invited the alleged error and failed to object to the chief judge reassigning the case to herself, he has lost the right to assert this issue on appeal. *Id.* Plaintiff does not dispute in his brief on appeal that he asked the chief judge to reassign the case to herself. However, he asserts that because he was not represented by counsel, he cannot have waived this issue on appeal. The record reveals that plaintiff dismissed numerous attorneys during the course of the proceedings and that he proceeded in pro per at some of the lower court proceedings. However, plaintiff was represented by attorney Andre F. Mays at the motion hearing in which the chief judge reassigned the matter to herself.<sup>5</sup> Plaintiff’s claim that he did not have the benefit of counsel is therefore without merit.

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<sup>5</sup> We observe that the trial court held that there was no reason to disqualify the previous judge assigned to the case, but that, since the previous judge did not object to the removal of the case from his docket, she would reassign the case to her docket. The reason cited by the chief judge on the record for her actions was the fact that there had not been closure to the case and that it  
(continued...)

Affirmed.

/s/ Stephen L. Borrello

/s/ Kathleen Jansen

/s/ Jessica R. Cooper

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(...continued)

had been going on for four years.